84-1329

No. 84

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1984

DIANE B. CREA,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

JURISDICTIONAL STATEMENT

CHARLES HAYDON
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Question Presented.

Whether a zoning ordinance which prohibits appellant from harboring pigeons at her residence as a sport, pastime and hobby affects substantially and adversely the rights of appellant and violates the Due Process and Equal Protection clauses of the Fourteenth Amendment.

The Parties.

The caption of the case in this Court contains the names of all the parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984.

DIANE B. CREA,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

JURISDICTIONAL STATEMENT.

Opinion Below.

The order and opinion of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts are not yet reported, and copies are annexed as Exhibit A. The opinion of the Justice Court, Village of Pelham Manor, County of Westchester, State of New York, is not reported and a copy thereof is attached hereto as Exhibit B. The denial of the application for leave to appeal to the New York Court of Appeals is not yet reported, and a copy thereof is annexed hereto as Exhibit C.

Jurisdiction.

The proceeding is a criminal proceeding. The appellant was convicted of violating the Zoning Ordinance of the Village of Pelham Manor in that she kept racing pigeons at her residence in a district zoned for residences in which the Ordinance barred the keeping of pigeons, and of violating the Building Code of the Village in the keeping of coops for such pigeons.

The final order sought to be reviewed was the order of the aforesaid Appellate Term of the Supreme Court, which was entered on September 26, 1984, and affirmed the judgment of conviction of the aforesaid Village Court which was entered on December 9, 1983. An application for leave to appeal to the New York Court of Appeals was timely made, and the application was denied on December 20, 1984. No applicaton for rehearing was made and there is no order respecting a rehearing.

The Notice of Appeal was filed in the Appellate Term of the Supreme Court on January 22, 1985, and in the Justice Court, Village of Pelham Manor on January 23, 1985.

The statutory provision believed to confer jurisdiction of the appeal on the Supreme Court is Title 28 U.S.C. §1257(2). Cases believed to sustain jurisdiction are: *Cohen v. California,* 91 S.Ct. 780, 403 U.S. 15, 29 L.Ed2d 284, rehearing denied 92 S.Ct. 26, 404 U.S. 876, 30 L.Ed2d 124; *Sultan Ray & Timber Co. v. Dept. of Labor and Industries of State of Washington,* 48 S.Ct. 505, 277 U.S. 135, 72 L.Ed. 820; *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 605, 95 S.Ct. 1200, 43 L.Ed.2d 482, 493.

The Constitutional Provisions and Statutes Involved.

United States Constitution:

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Zoning Resolution, Village of Pelham Manor:

Section 11.

"1. It is the intent of the Village and the purpose of the Zoning Ordinance:

(a) To guide its future growth and development in accordance with a plan of land use and population density that represents the most beneficial and convenient relationships among the residential, non-residential, and public areas within the Village, considering the suitability of each area for such uses as indicated by existing conditions, trends in population and mode of living, and future requirements within the Village and in relationship to areas outside thereof.

(b) To protect the character and the social and economic stability of all parts of the Village; to encourage the orderly and beneficial development of all parts of the Village, and to protect and conserve the value of land and buildings appropriate to the various districts established by this Ordinance.

(c) To promote the most beneficial relationship between the uses of land and building uses in relationship to the traffic capacity of the having particular regard for the potential amount and intensity of such land and buildings uses in relationship to the traffic capacity of the street system so as to avoid, minimize and reduce congestion in the streets; and to promote safe and convenient vehicular and pedestrian traffic movements appropriate to the various uses of land and buildings throughout the Village.

(d) To provide adequate light, air and privacy; to secure safety from fire and other danger and to prevent overcrowding of the land and undue congestion of population.

(e) To enhance the appearance of the Village as a whole and in its parts.

(f) To bring about the gradual conformity of the uses of land and buildings throughout the Village to the Ordinance set forth herein, and to minimize conflicts among the uses of land and buildings.

(g) To provide a guide for public action in the orderly and efficient provision of public facilities and services, and for private enterprise in building

development, investment, and other economic activity relating to uses of land and buildings throughout the Village.

(h) To protect the open space environmental character of the Village and to provide for the continuation of existing recreational and open space uses in an efficient and economic manner."

Section 32, subsection 4, subdivision j.

"In Residence 'AAA', 'AA', 'A', 'B' and multifamily districts no building shall hereafter be erected, allowed or used nor shall any land be used for the keeping of barnyard fowl, farm animals, horses or pigeons."

Statement.

The appellant was convicted of violating the Zoning Ordinance of the Village of Pelham Manor, New York in that she kept racing pigeons at her home, and of violating the Building Code of the Village in that the racing pigeons were kept in pigeon coops.

The Trustess of the Village of Pelham Manor adopted a Zoning Ordinance which divides the Village into ten classes of districts: (1) Residence "AAA"; (2) Recreational "R"; (3) Residence "AA", (4) Residence "A"; (5) Residence "B"; (6) Multifamily; (7) Retail; (8) Business; (9) Industrial and (10) Railroad.

Appellant is the owner of and resides at a private home at 29 Witherbee Avenue, Pelham Manor, in an area designated by the Zoning Ordinance as a Residence "AA" district.

The Zoning Ordinance (Section 32, Subsection 4, Subdivision j) prevented a building in five of the ten districts from being used "for the keeping of . . . pigeons". One of those five districts is an "AA" District, one in which Appellant had her home.

It was not disputed that all of the districts from which the keeping of pigeons is barred are contiguous to districts from which the keeping of pigeons is not banned.

It was equally not disputed that within two miles of all of the districts of the Village is a wildlife sanctuary where wild birds are kept, protected and encouraged to fly where they will, including over the districts from which the Village barred the keeping of pigeons.

The stated purposes of the Village Trustees in adopting the Resolution were set forth in its Section 11, above set forth. In capsule form they intended (a) to guide the future growth of the Village; (b) to protect the character and social and economic stability of the Village; (c) to promote the most beneficial relationship between the uses of land and buildings in relationship to traffic; (d) to provide adequate light, air and privacy and to secure safety from fire and other damages; (e) to enhance the appearance of the Village; (f) to bring about the conformity of the uses of land and buildings in the Village to the Zoning Ordinance; (g) to provide a guide for public action in the orderly and efficient provision of public facilities and (h) to protect the open space environmental character of the Village.

Not a single one of the specific purposes of the Resolution had even a remote relationship to the practice of the sport of pigeon racing or the maintaining of racing pigeons for sport purposes. Yet, on July 18, 1983, ap-

pellant was served with a summons issued out of the Justice Court of the Village of Pelham Manor, charging her with a violation of the Zoning Ordinance by keeping racing pigeons and raising them at her residence, while engaging in the sport of racing them, and with a violation of the Building Code in keeping the racing pigeons in unauthorized coops.

The appellant moved on August 9, 1983 to dismiss the charges on the ground that the Zoning Ordinance which barred the keeping of racing pigeons was unconstitutional in that it was arbitrary, capricious, irrational, served no governmental purpose and did not comport with the stated purposes of the Zoning Ordinance.

The Village Justice denied the application on the ground that "A Zoning Ordinance . . . is presumed to be constitutional and valid" (Exhibit D).

The case was set down for trial.

A trial was then had on November 16, 1983. The sole witness for the prosecution was the Village Administrator who had caused the summons and charges to issue. He testified that there were pigeon coops at the premises and he saw pigeons coming and going inside from the residence on to a platform on the outside and "vice versa".

The prosecution produced no evidence that any study had been made or evidence obtained by the Village Board of Trustees which dealt with the relationship of the harboring of racing pigeons to the stated purposes of the Zoning Resolution. Nor was there any evidence that the harboring of racing pigeons had any effect on the safety, morals, general welfare or health of the community. In

short there was nothing provided pertaining to the reason for the existence of the challenged ordinance.

Appellant again moved for a dismissal on constitutional grounds, among others, and again the application was denied. While no reason was given, it was clear that the Village Justice was relying solely on what he termed a "presumption of constitutionality".

The evidence provided by appellant demonstrated that homing or racing pigeons are kept in furtherance of improving the breed as a sport. Homing pigeons were imported from Europe and in this country their qualities were developed to a higher and higher degree.

Seminars are conducted at universities on the care and training of homing pigeons. They are raced about 20 weeks in each year and as, in horse racing, purses are made up, with winners earning as much as $30,000 per race.

The cleanliness of racing pigeons is of prime importance to their harborers. Racing clubs maintain inspection teams which see to it that sanitary measures are taken to prevent the birds from harming the community.

The loft kept at the appellant's home is one of the finest and cleanest and most sanitary in the country. The birds are medicated. Appellant introduced a qualified medical doctor who had expertise in the transmission of diseases, who testified that pigeons do not transmit man-related diseases. His testimony was stricken on the ground that he was not a veterinarian, a ground that runs contrary to the weight of authority in New York as well as in the entire nation. (*Fuller v. Preis,* 35 N.Y.2d 425, 831, 363 N.Y.S.2d 568; *Harris v. Smith,* 372 F.2d 806, 813, 8 Cir. 1967).

There is an International Federation which deals with the sport of pigeon racing throughout the world. In Belgium it is sponsored by the national government, and the owner of an apartment house in that country is required to make provision for a pigeon loft.

The reason for the interest of governments in the sport is probably best demonstrated by the evidence produced by appellant that the Government of the United States requested homing pigeon owners to supply them to the Armed Forces in World War II for use in combat. The owners did supply such pigeons at no charge.

The legislators of various states have recognized the value of the sport as fostering a national asset, and New York protects homing pigeons through its Conservation Law which provides (Environmental Conservation Law 511-0513, subd. 1):

> "No person shall at any time, by any means or in any manner capture, kill or attempt to capture or kill any Antwerp or homing pigeon, wearing a ring or seamless leg band with its registered number stamped thereon; nor shall any person remove such mark. No person except the lawful owner shall detain, possess, or transport Antwerp or homing pigeons wearing a ring or seamless leg band with the registered number thereon."

Even in cities of millions of people, where the keeping of animals might be deemed a health hazard, the State of New York has permitted the harboring of Antwerp or homing pigeons.

New York's Multiple Dwelling Law privides in §12, subd.2:

> "It shall be unlawful to keep any horse, cow, calf, swine, rabbit, sheep, goat, chicken or duck, or any pigeon except Antwerp or homing pigeons, in or on any multiple dwelling or on the lot or premises thereof unless permitted by and in accordance with local law or regulation."

The International Federation has also established a system of branding homing pigeons. When a bird is about a week old, a seamless identification ring, which is there for the rest of its life, is placed on its leg. Removal of the ring is forbidden by the Environmental Conservation Law §11-0513 (*supra*).

The birds are classified and their pedigrees kept in much the same way as the pedigrees of race horses. As in the case of thoroughbred horses, the performance of the birds in races is categorized and charted. To achieve the finest pedigrees and eventually breed the healthiest birds, pigeons are mated carefully and coops are cleaned twice each day.

Laboratories conduct tests every three or four months to monitor the health of the birds.

The homing pigeons at appellant's residence were cared for by her husband. They had twenty-five birds each having a market value of from $100 to $2500. He had been involved in pigeon racing since about 1957.

He was a member of the American Racing Pigeon Union Incorporated and as such had undertaken to donate the pigeons to the Armed Services in time of national emergency.

The birds are tested regularly and a laboratory advises him every thirty days during racing season and every sixty days at other times as to the state of health of the pigeons for, as he put it, "in order to compete in the sport, the birds have to be one hundred percent healthy".

The birds competed in races ranging in distance from one hundred miles to six hundred miles. They were trucked to a release point, fitted with a timing device and released to find their way home by their instinct which is intensified through the selective breeding process. One of the facets of racing pigeons is that they are trained to fly straight into a coop without circling about. For if a bird circles before entering the coop, it delays the time when the timing device can be removed, and the delay may cause a loss of position in the final standings of a race.

Racing pigeons are fed so that they leave no droppings while flying. Droppings are confined to the coops. They do not indulge in cooing outdoors and make no noise when leaving the coop or returning.

Again at the end of the entire case, the appellant moved to dismiss on the ground that there was no evidence that the resolution involved had any relationship to the health, morals, general welfare or safety of the community, and that it was irrational and unconstitutional.

The Justice again denied the motion. In his decision (Exhibit B) he said "The real issue here is the constitutionality of the Zoning Ordinance itself".

Again he cited the presumpiton of validity and decided that appellant had not overcome that presumption.

The appellant took the only appeal authorized, to the Appellate Term of the Supreme Court of the State of New York, and raised the same constitutional questions: due process and equal protection. The Appellate Term affirmed the Village Justice without an opinion.

The only avenue left open was an application to the New York Court of Appeals for leave, in that court's discretion, to appeal. Appellant made that application on the same constitutional grounds, and the application was denied, without opinion.

The Questions Are Substantial.

The questions involved are substantial and require plenary consideration with briefs on the merits and oral argument for their resolution.

(1) At the heart of the entire matter is the quality of life in the United States. This Court has sustained zoning ordinances where it found that "the validity of the legislative classification for zoning purposes (is) fairly debatable . . ." (*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 71 L.Ed. 303, 47 S.Ct. 114).

In *Village of Belle Terre v. Boraas,* 416 U.S. 1, 8, 39 L.Ed.2d 797, 803, 94 S.Ct. 1536, this Court also pointed out that such legislation should be rationally related to the objective, saying:

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting *Roysten*

> *Guano Co. v. Virginia,* 253 U.S. 412, 415, 64 L.Ed. 989, 40 S.Ct. 560) and bears 'a rational relationship to a [permissible] state objective.' *Reed v. Reed,* 404 U.S. 71, 76, 30 L.Ed2d 225, 92 S.Ct. 251."

It was not disputed that homing pigeons served in the Korean War. Prior to that war, the Army Signal Corps Pigeon Service by the close of World War II had trained more than 3000 enlisted men and 150 officers in bird specialties. The Fifth Army in Italy used such pigeons for over 10,000 messages in one year. Many scouts behind enemy lines were not given radios; they used pigeons.

The history of the use of homing pigeons indicates that the Egyptians trained homers as early as 3000 B.C. The ancient Greeks used them; the Saracens used them in their battles against the Crusaders. During the Franco-Prussian War of 1870 when Paris was surrounded, the city was kept in touch with the outside world by homing pigeons. After that war, nearly all European nations used them. The United States first began their use as military adjuncts in July, 1878, when Col. Nelson Miles employed them in the Signal Corps in the Dakota Territory.

While banning the keeping and raising of racing pigeons may have economic effects upon home owners who desire to engage in the sport, the cases in New York which sustain such legislation rest in the main on the seminal case of *Barkmann v. Town of Hempstead,* 294 N.Y. 805, which found pigeon breeding an insubstantial pastime, beneath judicial notice.

The Zoning Ordinance in that case prohibited the harboring of pigeons upon the plaintiff's property. The *nisi prius* court held the Ordinance unconstitutional, but the Appellate Division of the Supreme Court, the intermediate

Appellate Court, reversed and said (268 App. Div. 785, 787, 49 N.Y.S.2d 262, 264):

> ". . . it may not be said that the (Zoning) section is void and unconstitutional because of unreasonableness, in a case which concerns the keeping of pigeons as a pastime and which leaves undisturbed the full use of the premises for all proper and usual purposes theretofore engaged."

The Court of Appeals affirmed without opinion (294 N.Y. 805).

The Village Justice convicted appellant upon the same ground, and the cases in New York, which sustain zoning ordinances barring pigeons, rest in the main on the same ground: that the pastime is insubstantial and barring it does not interfere with the "proper and usual purposes" of the ownership of property.

(2) *Barkmann* was decided by the Appellate Division in 1944 and in 1945 by the Court of Appeals, during World War II, before courts participated in recognizing that the quality of life in the United States comprehends more than the possession of real estate in an elite environment.

The nation's consciousness has since been raised to include hobbies as a proper ingredient of life in a private residence. In *Sechrist v. Municipal Court,* 64 Cal. App.3d 737, 134 Cal. Rptr. 733 (1976), the court held:

> "It is evident, that the use of property for a single family residence includes those customary activities which make the home more comfortable and enjoyable, such as gardening, certain recrea-

> tional activity, and the enjoyment of certain hobbies. The scope of such activity is circumscribed only insofar as it may not assume a commerical or public character, or constitute a health hazard to the neighborhood. (see *Hardy v. Calhoun,* [Tex. Civ. App. 1964] 383 S.W. 2d 652, 654)."

The appellant's hobby has sufficient substance to be protected against arbitrary and capricious action. That the barring of pigeons has no relationship to the stated purposes of the Zoning Ordinance which comprehends the banning is self-evident.

Additionally, the right to participate in a sport has since World War II been recognized as a substantial right against which all irrational impediments will be set aside. In *Morris v. Michigan State Board of Education*, 472 F.2d 1207, 1209 (CA, 1973), classification by sex was held to be subject to the same clause appellant invokes in this case, the Equal Protection Clause, and the test was articulated precisely as the test is set forth in the New York zoning cases (*Weisman v. Evans*, 56 N.Y.2d 458):

> ". . . to ascertain whether there is a rational relationship to a valid state purpose. *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971)."

The significance of that case is that the right protected, which was held to be substantial enough to fall within the constitutional protections, was the right to engage in interscholastic athletic contests. If ever there was a pastime of less substance than the harboring and raising of pigeons for sport involving thousand of dollars as prizes and as an adjunct to national defense, certainly interscholastic athletics is such a pastime.

The raising of the consciousness of Americans to include sports and hobbies as necessary adjuncts to life, not mere pastimes, has received recognition throughout the nation. In *Brenden v. Independent School District 749*, 477 F.2d 1292 (8 Cir., 1973), the Court found:

> "In view of these circumstances, we must conclude that at the very least, the plaintiffs' interest in interscholastic sports is a substantial and cognizable one."

In *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (USDC, N.D., Ill. ED., 1977), the Court held that the opportunity to compete in soccer was a substantial right to be protected against being "unequally burdened or denied."

There has been a proliferation of cases in which the right to engage in what was once deemed unsubstantial pursuits was considered substantial enough for protection against arbitrary government action. *Dodson v. Arkansas Activities Assn.*, 468 F.Supp. 394 (USDC, ED., Ark., W.D.), dealt with playing basketball "full-court" rather than "half-court." *Reed v. Nebraska School Activities Assn.*, 341 F.Supp. 258 (USDC, Neb. 1972) involved the right to play golf. *Buckton v. Natl. Collegiate Athletic Assn.*, 366 F.Supp. 1152 (USDC, Mass. 1973) involved the Equal Protection Clause to protect Canadian amateur hockey players and their right to play hockey as an avocation.There was no sex discrimination involved; merely an arbitrary classification.

Probably, the most insubstantial of all of the rights protected against arbitrary and irrational classification appears in *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F.Supp. 593 (USDC, SDNY, 1970) where it was held irrational to bar women from purchasing ale in a bar. State involvement was found in the existence and renewal of liquor licenses.

There is just no rational method of deciding that the right to play basketball on a full court, or play golf or participate in soccer are substantial and protected rights and at the same time hold the appellant's involvement with homing pigeons is not.

(3) Courts in other states have found that the pastime of harboring pigeons for racing and breeding purposes was of sufficient substance to evoke constitutional recognition and thus protection.

In an Ohio case, *Hahn v. City of Brooklyn,* 153 N.E.2d 359 (Com. Pl. Ohio, 1958), the Court said:

> "In the light of all of the evidence before the Court, the Court feels that this ordinance as it affects the maintaining and raising of homing pigeons by the plaintiff is unreasonable and arbitrary and has no real and substantial relation to the health, safety and general welfare of the citizens of the City of Brooklyn
>
> * * *
>
> In the opinion of the Court from the evidence the maintaining and raising of homing or racing pigeons is a wholesome, useful sport and this ordinance, insofar as it interferes with the plaintiff in pursuing or engaging in such hobby or sport, is invalid and bears no real and substantial relationship to the health, safety and general welfare of the citizens of Brooklyn."

In *County of Spokane v. Meyer*, decided in the District Court of the State of Washington on October 8, 1981, case

#14779, not otherwise reported, the Court held that the keeping of racing pigeons was not the harboring of fowl, saying:

> "I'm going to rule-that racing pigeons within the meaning of this ordinance are not in violation, that they are household pets kept for the enjoyment of the occupant. . . . I rule on the evidence before me these racing pigeons are kept for personal enjoyment."

Wiley v. County of Hanover, 209 Va. 153, 163 S.C.2d 160, stands for the proposition in Virginia that, in the absence of evidence to the contrary, the maintenance of a pigeon coop is an " 'accessory building" and "customarily incidental to . . . a main use' of a family dwelling".

In New Jersey, it was held in the case of *Rigoglioso v. Farese,* Chauncey Division, Superior Court of New Jersey, Bergen County, Docket No. C-3275-76 (June 28, 1977) (not otherwise reported) that maintaining a pigeon coop with approximately 200 racing pigeons approximately 8 feet from a neighbor's dwelling did not constitute a nuisance. There was no evidence that it constituted either a health hazard or danger.

Essentially, a right protected by the federal constitution in one state does not lose its quality when raised in another state.

There are thousands of racing pigeon fanciers, harborers and keepers who participate in the sport throughout all of the states in the nation. It is essential to the growing sport with its long history that this Court speak.

State interference with the use of private property may only be justified when it is necessasry for the preservation of public health, safety, morals or general welfare. The history of the law of real property demonstrates that limitations on use are the exceptions, and must be subservient to a demonstrable public need, as indicated.

> "In England in ancient times land was holden of the King whose power was supreme. As the King's power decreased and the power of his nobles increased, slowly the right, first of the nobles and then of every land owner to freely and absolutely possess and enjoy the land which he owned in freehold, became recognized by all as a sacred, absolute, inviolable right. It was considered a part of his fundamental liberty, as very important part of the fundamental law which was the supreme law of the land and which was called the Common Law because it was given to all in common.
>
> * * *
>
> Restriction imposed by zoning ordinances are, however, in derogation of the common law and (at times) of the liberties, rights and privileges guaranteed by the Constitution of the United States . . ." Mr. Justice Beel, for the unanimous Supreme Court of Pennsylvania, in Appeal of Lord, 368 Pa. 121, 81 A2d 533, 535.

There being no relationship between the zoning resolution and a legitimate government interest or even the purpose stated it is unconstitutional.

Under all of the circumstances, it is urged that the questions presented are substantial and that they are of widespread and public importance.

Dated: New York, New York
February 12, 1985

Respectfully submitted,

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Exhibit A.

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 26th day of September, 1984.

Present—
Hon. Morrie Slifkin,
Justice Presiding
Hon. William R. Geiler
Hon. Andrew J. DiPaola
Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

DIANE B. CREA,

Appellant.

The above named Diane B. Crea, the defendant herein, appealed to this Court from a judgment of conviction of the Justice Court, Vil. Pelham Manor, Westchester, rendered on the 9th day of December 1983, after a trial convicting him of the following violations and imposing sentences as follows:

Sec. 106, Par. 1 Bldg. Code—$250 (Paid)
Sec. 32, Par. 4(j) Zoning Code—$250 (Paid)

and the said appeal having been submitted by Charles Haydon, Esq., of counsel for the appellant, and submitted by Leonard A. Weiss, Esq., of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the order and judgments of conviction are affirmed. All concur.

JOHN A. CAHILL
Chief Clerk
Appellate Term

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM

9th and 10th Judicial Districts

Present:
Slifkin, J.P., Geiler and DiPaola, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

DIANE B. CREA,

Appellant.

No. 84-205

Decided

Appeals from judgments of conviction convicting defendant of violating section 32, paragraph 4 (j) of the Zoning Ordinance of the Village of Pelham Manor and section 106, paragraph 1 of the Building Code of the Village of Pelham Manor and from an order which denied defendant's pretrial motion to dismiss the accusatory instruments.

Order and judgments of conviction affirmed. No opinion. All concur.

Exhibit B.

Decision.

JUSTICE COURT OF THE VILLAGE OF PELHAM MANOR

COUNTY OF WESTCHESTER AND STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Complainant,

against

DIANE B. CREA,

Defendant.

Defendant was charged with violating Section 32, Paragraph 4 (j) of the Zoning Ordinance, namely on June 28, 1983 she used the building and land at her premises 29 Witherbee Avenue, Pelham Manor, New York, located in a residence AA District, for the keeping of pigeons. 2. Violating Section 106, paragraph 1 of the Building Code on June 28, 1983 in that she materially departed from plans and specifications approved on July 1, 1981 for building permit Number 2858 by permanently closing two garages and converting said garages into pigeon coops and failing to convert a third garage into a dressing room for a pool with a bath and storage area for pool supplies but instead permitted same to remain open to be used as a storage area for building materials.

The Village Administrator, Richard Blessing testified as to the facts underlying the charges herein. He saw the pigeons at the premises at the garage. In essence they were not controverted. In fact, they were admitted by defendant's husband. The foregoing was all done in spite of the fact that defendant had been denied permission to alter the detached accessory building, namely the garage for the keeping of homing pigeons. Such denial was affirmed by the Board of Appeals and defendant's Article 78 proceeding for a judgment reversing the Board of Appeals was denied by order of Justice John A. Marbach, dated April 8, 1981. Defendant contends that she is not guilty herein because the aforesaid Zoning Ordinance is unconstitutional and the informations are jurisdictionally defective.

At the end of the People's case and at the end of the trial defendant moved to dismiss on the basis that the violation of the Building Code was insignificant, the original and superceding informations were insufficient as a matter of law and that the People have failed to prove their case beyond a reasonable doubt and that the matters be dismissed because the Zoning Ordinance is unconstitutional as it is irrational, arbitrary, capricious and finds no justification related to health, safety, morals or other interests and general welfare of the community as prescribed by Section 7700 of the Village Law, the basis for the Zoning Ordinance. The Court reserved its decision at the end of the trial regarding same and now rules that the said motions to dismiss on the foregoing basis are in all respects denied.

The Court finds as a matter of law that the superceding accusatory instruments regarding violation of Section 32-4(j) of the Zoning Ordinance and Section 106 (i) of the Building Code are sufficient. They are clear and concise and adquately defined the actions of the defendant which comprised the alleged violations.

There can be no question regarding the fact that defendant violated the statutes. She clearly violated same and admitted same by her own witness, her husband. The real issue here is the constitutionality of the Zoning Ordinance itself. Defendant claims the statute which "prohibits the erection, alteration or use of any building or land for the keeping of pigeons in a residence "AAA", "AA", "A" and "B", and multifamily districts is unconstitutional as it constitutes an unconstitutional assumption of power, an unconstitutional interference with the rights of defendant and is an unconstitutionally discriminatory exercise of Power.

The testimony at the trial showed no unconstitutional discriminatory exercise of power herein. According to Mr. Blessing no other persons to his knowledge harbors pigeons in the Village except the defendant. The Court so finds as a matter of fact.

A zoning ordinance is a legislative act. This legislative decision may not be disturbed unless the legislature has exceeded its powers or had acted in an arbitrary or unreasonable manner. Such act is presumed to be constitutional and valid. The burden is on the defendant to show otherwise at a trial of the facts and the law involved therein.

Exercise of Police power by Village is not limited to mere regulation; within general authority to regulate may exist the power to prohibit in furtherance of aesthetic values or public well-being provided, however, that the exercise of that power is not arbitrary, capricious or irrational. *Friedland v. Diamond* 324 NY 2d 598, 67 Misc. 2d 642.

To what extent pigeons are a nuisance in a particular area is in the first instance a legislative matter. It may not be said that the zoning section herein is void and unconstitutional because of unreasonableness in a case which

concerns the keeping of pigeons as a pastime and which leave undisturbed the full use of the premises for all proper and usual purposes heretofore enjoyed. See *Barkman v. Town of Hempstead,* 294 NY 805, affg. 268 App. Div. 785.

Defendant contends that she has met her obligation of coming forward to rebut the presumption of constitutionality and that she has overcome same. She presented evidence which showed racing of homing pigeons is a sport and a hobby upon which there are entry fees for races and prizes varying from $500.00 to $30,000.00. Further testimony on the part of defendant indicated that for approximately the first three months after birth the pigeons are kept on a fly, a screened in open air platform so that they become familiar with their surroundings. They then are let out twice a day, circle once, and fly away within 29 days of birth and return immediately into the loft. She contended the pigeons have no droppings in flight, make no noise, and the coops are kept clean. After the aforesaid 29 days they are still let out but fly further distances, again returning to their coops.

This type of ordinance has been upheld in the Courts of New York and by the Court of Appeals. Since this ordinance is within the power of the legislative body, as in the Village of Pelham Manor, the presumption of reasonableness attaches. It is the duty of the defendant to come forward and prove unreasonableness. The Court finds that the defendant has not sustained her burden of proof by either a fair preponderance, reasonable doubt or fair debate. A zoning ordinance, as the one in question, is calculated to achieve a broad purpose. It is tailored to fit a comprehensive plan which in turn is designed to serve the health, safety, morals and welfare of a whole community. The property in question is located in a Double AA, single family residence zone. The harboring of racing pigeons by

purchased the land with actual or constructive knowledge that the desired use was available to the defendant through a reading of the zoning regulations. In the instant case defendant caused the improvements with knowledge of the restrictions from which she seeks relief.

The approval of agricultural pursuits, reflected in the zoning ordinances which permit such uses in residential districts, does not include a general approval of raising or keeping animals in such districts. Raising pigeons has been described as a hobby rather than a home occupation. Harboring of pigeons, homing pigeons included, may be prohibited. Such a prohibited use has been upheld. See *Barkman v. Hempstead, Supra.; People v. Benincosa* 63 Misc. 2d 648; *People v. Miller* 304 NY 105. These cases all dealt with homing pigeons as in the instant case. A Case directly in point is the *People v. Benincosa, Supra.* as in this case, the defendant admitted ownership and keeping of pigeons. Permission had been denied. The Court held that generic term "pigeon" includes "Antwerp Pigeons", "Homing Pigeons". Unequal enforcement was not proved.

This Court finds that the Zoning Ordinance under which the defendant is charged is a valid and reasonable exercise of the Police powers of the Village of Pelham Manor. As stated hereinabove there is always a presumption that the legislative enactments are constitutional. The burden of proof as to invalidity of a statute rests on the challenger, and this burden has not been met. Depriving defendant of harboring pigeons does not affect substantially the property rights of defendant in the use of the premises, which are otherwise undisturbed and unimpaired. There is no confiscatory taking therein without due process.

The Court finds that all the essential elements to prove defendant's guilt have been established by the People. On

defendant is for a hobby or sporting purpose. Defendant's land is no less valuable if the foregoing is prohibited. The pigeons were harbored out of Pelham Manor and were only brought to defendant's residence this Summer. They were brought after application for such intended use had been denied by the Enforcement Officer, the Zoning Board of Appeals and the Supreme Court, Westchester County. This zoning ordinance was in effect when defendant bought her property. She and her husband had the right to inspect such ordinance before the sale. It is common knowledge that no prudent person should acquire an interest in land without first ascertaining the land use restrictions applicable to the parcel.

The Court finds that the defendant has not sustained her burden of proof that this zoning ordinance is arbitrary and unreasonable. She has not shown that it is not justified under the police power of the state by any reasonable interpretation of the facts. She has not overcome the presumption of constitutionality. The court must and has considered the effect of the proposed use on existing nearby uses. Testimony showed no other party in the whole village harbored pigeons. Her property is located in a single family Double AA zone. Defendant's large home, with a large pool, is in said zone. This Court can only conclude that such a use would alter the essential character of the neighborhood. It would be impossible to police the proper safeguards if allowed. No financial hardship is created by prohibition of this use. In fact, the condition herein was created by the defendant, the Court of Appeals has already ruled that a use variance to relieve self created hardship where the person acquired land for a purpose outlawed by the zoning ordinance should not be allowed. See *Clark v. Board of Zoning Appeals,* 301 NY 86, *Peo. ex rel Areekay Syndicate, Inc. v. Murdock,* 265 NY 158. The self created hardship rule applies whether the applicant

the dates in question defendant violated the Zoning Ordinance and Building Code, the latter by testimony not only of the People, but by admissions of her own witness. The harboring of pigeons is in direct violation of the Zoning Ordinance. All defendant's motions to dismiss are denied. Defendant is found guilty as charged and is fined $250.00 on each charge, total $500.00. The fine is to be paid by December 20, 1983

Dated: Pelham Manor, New York
December 9, 1983

ANTHONY PASQUANTONIO
Village Justice

EXHIBIT C.

Certificate Denying Leave.

STATE OF NEW YORK,

COURT OF APPEALS.

Before: Hon. Hugh R. Jones, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

DIANE B. CREA,

Appellant.

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of

*Description of Order: Order of the Appellate Term, Ninth and Tenth Judicial Districts entered September 26, 1984, affirming judgment of Village of Pelham Manor Justice Court entered December 9, 1983 (convictions—Pelham Manor Zoning Ordinance § 32(4)(j); Pelman Manor Building Code § 106(1).

law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
December 20, 1984

HUGH R. JONES
Associate Judge

Exhibit D.

Decision

JUSTICES COURT
Village Hall, Penfield Place
Pelham Manor
New York
Telephone: 738-2220

JUSTICE COURT OF THE VILLAGE OF
PELHAM MANOR
COUNTY OF WESTCHESTER STATE OF NEW YORK.

PEOPLE OF THE STATE OF NEW YORK,

Complainant,

against

DIANE B. CREA,

Defendant.

Defendant has made an omnibus motion for an order dismissing the charge of violating Section 32, paragraph 4(j) of the Zoning Ordinance of the Village of Pelham Manor as unconstitutional, dismissing the charge of violation of Section 106, paragraph 1 of the Building Code in that the accusatory instrument is defective, and for an order prohibiting any attorney other than the District At-

torney of Westchester County from prosecuting these charges in the name of the People of the State of New York. The People have submitted as part of their answering papers an Amended Accusatory Instrument in regard to the violation of Section 106, para. 1 of the Building Code. For the purposes of this motion the Court will consider the latter as a superceding information.

The motion papers indicate the defendant is the fee owner of the property in question. She had sought to alter a detached accessory building for the keeping of racing homing pigeons. Her application was denied and her appeal under an Article 78 proceeding in the Westchester Supreme Court was likewise denied. The new information alleges that in July of 1981, defendant departed from plans and specifications approved by the Village for a building permit in that she permanently closed two garages and converted same into pigeon coops and failed to convert a third garage into a dressing room for a pool with a bath and storage area for pool supplies, but instead permitted same to remain open and to be used as a storage area for building materials, all in violation of Section 106(1) of the Building Code. The People also allege in a separate information that defendant violated Section 32, para. 4(j) of the Zoning Ordinance in that she used the building and land at 29 Witherbee Avenue, Pelham Manor, N.Y., located in a residence AA District, for the keeping of pigeons.

The Court denies the instant motion in all respects at this time and the matter is set down for October 11, 1983 so that defendant may be arraigned on the superceding information and so that the matter be set down for a trial date so that the issues raised in the moving papers may be tried.

A zoning ordinance is a legislative act. This legislative decision may not be disturbed unless the legislature has ex-

ceeded its powers or has acted in an arbitrary or unreasonable manner. Such act is presumed to be constitutional and valid. The burden is on the defendant to show otherwise at a trial of the facts and the law involved therein.

A reading of the superceding accusatory instrument regarding violation of Section 32-4(j) of the Zoning Ordinance and Section 106(1) of the Building Code show that they are sufficient as a matter of law. They are clear and concise and adequately define the actions of the defendant which comprise the alleged violations.

The Village Board has the right to choose a special prosecutor to prosecute these violations, be he a district attorney or not. Furthermore, the Westchester County District Attorney has consented that Mr. Martino prosecute same. The Comptroller, Attorney General and the Courts of this State have allowed outside counsel duly appointed to so act. The Court finds that as a matter of law Mr. Martino may prosecute these violations for the Village.

These matters are set down for October 11, 1983 for the purposes aforesaid at 8:00 P.M.

Dated: October 4, 1983

ANTHONY PASQUANTONIO
Village Justice

Notice of Appeal to the Supreme Court of the United States.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM

9th and 10th Judicial Districts

DIANE B. CREA,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

No. 84-205

June, 1984

Notice is hereby given that Diane B. Crea, appellant, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of New York, Appellate Term for the 9th and 10th Judicial Districts, entered on September 26, 1984, affirming the judgment of conviction of the appellant of the Justice Court, Village of Pelham Manor, County of Westchester, State of New York, rendered on the 9th day of December, 1983; application was timely made by the above named appellant

to the Court of Appeals of the State of New York for a certificate granting leave to appeal to that Court, which application was denied on December 20, 1984.

The appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
January 10, 1985

DUBLIRER, HAYDON, STRACI & VICTOR
Attorneys for Appellant
By: CHARLES HAYDON, a member
of the Firm
67 Wall Street
New York, New York 10005
(212) 943-0880

To:

Clerk of the Supreme Court of the
State of New York, Appellate Term
for the 9th and 10th Districts

Clerk, Justice Court
Village of Pelham Manor

Avstreith, Martino & Weiss, Esqs.
Special Attorneys for Respondent
20 East First Street
Mount Vernon, New York 10550
(914) 668-5506

Affidavit of Service

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM

9th and 10th Judicial Districts

DIANE B. CREA,

Plaintiff,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

State of New York)
County of)

BARBARA BADER, being duly sworn, deposes and says:

1. That your deponent is not a party to the action herein, is over 18 years of age and resides at 3311 Giles Place, Bronx, New York.

2. That on January 22, 1985, at 12:25 p.m. at 111 Livingston Street, Brooklyn, New York your deponent served the within Notice of Appeal personally on Frank Sheridan, Court Officer, for Supreme Court of the State of New York

Appellate Term for the 9th & 10th Districts by delivering a true copy of said Notice to said defendant;

3. That your deponent knew the person served to be the defendant herein and that deponent's description of said defendant is as follows:

✓Male
✓White skin
✓Brown hair
✓36-50 yrs.
✓5'4"-5'8"
mustach
✓161-200 lbs.

BARBARA S. BADER
License No. 776332

Sworn to before me this
24 day of Jan, 1985
Ellen M. Galcik
Commissioner of Deeds
City of New York No. 3-1734
Certificate filed in Bronx County
Commission Expires Jan. 1986

Affidavit of Service

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM

9th and 10th Judicial Districts

DIANE B. CREA,

Plaintiff,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

State of New York)
County of)

BARBARA BADER, being duly sworn, deposes and says:

1. That your deponent is not a party to the action herein, is over 18 years of age and resides at 3311 Giles Place, Bronx, New York.

2. That on January 23, 1985, at 11:55 p.m. at 4 Penfield Place, Pelham, New York your deponent served the within Notice of Appeal personally on Richard Blessing, Village Clerk, for Justice Court, Village of Pelham Manor by delivering a true copy of said Notice to said defendant;

3. That your deponent knew the person served to be the defendant herein and that deponent's description of said defendant is as follows:

✓Male
✓White skin
✓Gray hair
✓51-65 yrs.
✓Over 6'
wears glasses
✓161-200 lbs.

BARBARA S. BADER
License No. 776332

Sworn to before me this
24th day of Jan, 1985
Ellen M. Galcik
Commissioner of Deeds
City of New York No. 3-1734
Certificate filed in Bronx County
Commission Expires Jan. 1986

Affidavit of Service

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM

9th and 10th Judicial Districts

DIANE B. CREA,

Plaintiff,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

State of New York)
County of)

BARBARA BADER, being duly sworn, deposes and says:

1. That your deponent is not a party to the action herein, is over 18 years of age and resides at 3311 Giles Place, Bronx, New York.

2. That on January 23, 1985, at 12:30 p.m. at 20 East First Street, Mount Vernon, New York your deponent served the within Notice of Appeal personally on Louis J. Martino, Esq., for Avstreith, Martino & Weiss, Esqs. by delivering a true copy of said Notice to said defendant;

BEST AVAILABLE COPY

3. That your deponent knew the person served to be the defendant herein and that deponent's description of said defendant is as follows:

✓Male
✓White skin
✓Gray hair
✓Balding
✓51-65 yrs.
✓5'4"-5'8"
✓131-160 lbs.

BARBARA S. BADER
License No. 776332

Sworn to before me this
24 day of Jan., 1985
Ellen M. Galcik
Commissioner of Deeds
City of New York No. 3-1734
Certificate filed in Bronx County
Commission Expires Jan. 1986